A **DATUK BANDAR KUALA LUMPUR**

v.

PPKA SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: D3-22-1029-2008]
18 JULY 2011

C ***CONTRACT:*** *Estoppel - Estoppel by conduct - Extension of concession to operate car park - Profit sharing ratio and revenue paid to plaintiff - Whether defendant estopped from claiming plaintiff had no authority to extend concession - Whether defendant estopped from denying profit sharing agreement and claiming payments made thereunder a mistake*

D ***CONTRACT:*** *Agreement - Terms of the agreement - Extension of concession to operate carpark - Profit sharing ratio and revenue paid to plaintiff - Whether defendant estopped from claiming plaintiff had no authority to extend concession - Whether defendant estopped from denying profit sharing agreement and claiming payments made thereunder a mistake - Whether parties agreed to be bound by letter of extension as constituting extension terms of agreement*

Pursuant to an agreement ('the agreement'), the plaintiff granted the defendant a concession to operate a computerised car park at F the Kuala Lumpur Wholesale Market Complex for five years. Apart from yearly rent, the agreement required the defendant to pay the plaintiff 70% of the gross collection above RM2.1m per year. Before the agreement expired, the defendant asked the plaintiff for a 5-year extension of the concession on new rental and profit- G sharing ratio to be negotiated. The plaintiff, instead, allowed the defendant to continue operating the car park on a month-to-month basis until such time the plaintiff chose to end the arrangement, subject to the same terms and conditions of the agreement. The profit-sharing ratio in favour of the plaintiff, H however, was varied to 70% of the gross parking fees collected per month provided the gross amount collected exceeded RM175,000 per month. After two years of this arrangement, the plaintiff terminated the concession and asked the defendant to deliver up vacant possession of the car park. The defendant's I request for further extension of the concession was refused and the plaintiff sued the defendant for RM586,049.33 owing under the profit-sharing arrangement. The defendant counterclaimed for a declaration that there was in fact no extension of the agreement

upon its expiry and that the plaintiff did not have the authority to unilaterally extend the terms and conditions of the agreement upon its expiry. The defendant also claimed for a refund of RM4,523,434.56 it had paid to the plaintiff under the profit-sharing arrangement during the period it operated the car park on a month-to-month basis, claiming the payment was made under mistake.

Held (allowing the claim with RM20,000 costs and dismissing the counterclaim):

(1) After having asked for an extension of the concession and having obtained it, it was not open to the defendant to say the plaintiff had no authority to extend the concession. After having paid the profit-sharing ratio and revenue to the plaintiff it was estopped from asserting there was no profit-sharing agreement and that past payments during the extended period were paid under mistake. (para 32)

(2) If, as the defendant contended, there was no basis for the extension of the concession, then correspondingly there was no basis for the defendant to have remained on the demised premises to continue collecting parking charges from the public. (paras 21 & 34)

(3) The argument that the plaintiff had no power to extend the agreement was untenable. The defendant had applied and appealed to the plaintiff, it would not have done so if the plaintiff was powerless to grant an extension. The defendant must have recognised the plaintiff's right to extend the agreement and its corresponding right not to extend it further. (para 35)

(4) The parties did not contemplate the execution of a further contract. They had agreed to be bound by the letter of extension as constituting the extension terms of the agreement. The correspondence between, and conduct of, the parties brought the contract for extension into being. (para 43)

(5) The defence and counterclaim of mistake in payment was an afterthought made with the aim of avoiding payment of the arrears of profit-sharing revenue to the plaintiff. (para 50)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Teh Eok Kee & Anor v. Tan Chiah Hock & Anor [1996] 2 CLJ 227 FC ***(refd)***

Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92

Local Government Act 1976, s. 13

For the plaintiff/applicant - Maszalina Maspol; M/s Tetuan Rashid Asari & Co

For the defendant/respondent - HR Dipendra (Azrin Zarina Abd Ragis with him); M/s Arrianti Dipendra Jeremiah

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Human responses are different to predict especially after a termination of a relationship. Here the defendant had a concession from the plaintiff to operate a computerised parking service for five years. It must have been a lucrative business for the defendant had paid, it said RM13 million to the plaintiff being rental and profit sharing to the plaintiff. Little wonder that when the concession was about to expire the defendant appealed for its renewal and when it was about to expire again on 15 July 2002, the defendant again implored the plaintiff for another extension but this time to no avail. There were some arrears of rental and profit sharing payments before the second expiry which the defendant claimed was not due as the plaintiff had no authority to extend the concession and in any event the terms of the extension with respect to the profit sharing ratio and revenue was never agreed.

[2] When the plaintiff claimed for the arrears outstanding for the profit-sharing revenue for the last four months before expiry in July 2002, the defendant put in a defence and counterclaim, counterclaiming the whole amount of the profit-sharing ratio and revenue paid during the extended period asserting that it was paid under a mistake.

Parties

[3] The plaintiff is a local authority under the Local Government Act 1976 and a body corporate by virtue of s. 13 of the said Act. The plaintiff and the defendant entered into a privatisation agreement dated 8 February 1995, for the management of a computerized car park service whereby the plaintiff granted a concession to the defendant to operate the car park at the Kompleks Pasar Borong, Kuala Lumpur for a period of 60 months expiring on 15 July 2000, subject to the terms and conditions therein.

[4] The yearly rental was RM840,000 annually and it was to be paid monthly by the 7th day of each month at a monthly rental of RM70,000 per month.

[5] There was also a profit-sharing formula set out in Item 6 of The First Schedule to the agreement whereby the defendant agreed to pay the plaintiff 70% of the amount of gross collection in excess of RM2.1 million per year.

Problem

[6] The privatisation agreement expired on 15 July 2000. Before its expiry the plaintiff wrote to the defendant a letter dated 15 April 2000 reminding the defendant that the provision of cl. 3.01 and 4.06 shall apply with respect to the obligations of the defendant in the surrender of the demised premises and the matters associated therewith. The letter is at p. 90 of the Common Bundle of Document (CBD) marked bundle D.

[7] The defendant wrote an appeal letter to the plaintiff dated 27 April 2000, in the Additional Common Bundle of Document marked Bundle E at pp. 1-2. Besides recounting in the language of restrained boasting with respect to its performance in operating the car park concession and also of respectful hope, it politely pleaded for an opportunity to continue for the next five years based on a negotiated new rental and a new profit-share ratio.

[8] The said letter tugged at the plaintiff's heart-string and by letter dated 4 July 2000 at p. 91 of the CBD the plaintiff agreed to extend the concession period for the Defendant to operate the car park on a month-to-month basis commencing 16 July 2000 until a date to be informed by the plaintiff.

[9] The extension was subject to the same terms and conditions of the privatisation agreement dated 9 February 1995 except for the profit sharing formula. The profit sharing formula shall now be 70% of the gross parking fees collected per month provided that the gross fees collected exceeded RM175,000 and the same is to be paid not later than the first week of the following month. The defendant was also required to pay RM500 per month being the rental for the office space for the duration of the extension period.

[10] The extension was finally terminated by the plaintiff by their letter of 27 June 2002 and the defendant was asked to deliver vacant possession of the demised premises to the plaintiff on or before 31 July 2002.

[11] This was met by another appeal letter from the defendant to the plaintiff dated 8 July 2002 setting forth the reasons why the appeal for a five-year renewal of the contract should be allowed and humbly requesting that at the very least to allow the defendant to continue with the concession on a month-to-month basis until December 2002.

[12] The plaintiff stood firm in not renewing the privatisation agreement after 31 July 2002. Some payments were outstanding from the profit-sharing formula for April 2002 to July 2002 amounting to RM796,049.33. The defendant made various payments from 27 December 2002 till 26 April 2005 leaving a balance of RM586,049.33 outstanding.

Prayer

[13] The plaintiff claims against the defendant for:

(a) the sum of RM586,049.33 as at 26 April 2005;

(b) Interest at the rate of 8% per annum from date of judgment till realisation and costs.

[14] The defendant counterclaims as follows:

(a) A declaration that the privatisation agreement dated 8 February 1995 could not and was not extended upon its expiry on 15 July 2000;

(b) A declaration that the plaintiff did not have the authority to unilaterally extend the terms and conditions of the privatisation agreement dated 8 February 1995 upon its expiry on 15 July 2000;

(c) The sum of RM4,523,434.56 being the sums paid by the defendant under the non-existent profit-sharing arrangement as at 31 July 2002;

(d) Interest at the rate of 8% of the date of this counterclaim until full realization;

(e) Costs; and

(f) All other further and/or ancillary relief this Honourable Court deems just, fit and appropriate.

Parol Evidence

[15] There is no doubt that before the expiry of the privatisation agreement on 15 July 2000, the defendant had written to the plaintiff appealing to the plaintiff to extend the concession period further five years on a new rental and a new profit-sharing ratio. The language of extreme courtesy and polite petition is writ throughout the letter of 27 April 2000 from the defendant to the plaintiff at p. 1-2 of bundle E of the additional CBD as set out below:

> Re: Privatisation of the Computerised Carparks at the Pasar Borong, Kuala Lumpur.
>
> With reference to your letter dated 15 April 2000 which was faxed to us on the 19 April 2000, we would like to take this opportunity to thank DBKL for having given us a concession to manage the above car park for the past 5 years.
>
> As you are well aware PPKA S/B has successfully proven that the computerised system and controls had worked very well for DBKL in areas such as providing up to-date information on all revenues collected. The customers have also enjoyed the best facilities and services without any complaints. To this end PPKA S/B was able to meet up with all commitments and responsibilities.

A Apart from having been very successful at the operations, we have also been a good paymaster and to date, we are proud to say that we have paid DBKL approximately RM13 million in rentals and profit share. Also this computerised car parking system is one of its kind in Malaysia tailored specifically to meet the requirements of the different groups of customers.

B

We hope that DBKL will take into consideration these achievements accomplished by PPKA S/B and Sankya (The Programmer). We also hope that DBKL would continue to support these enterprising companies to establish a firm foundation in the parking industry. With these in mind we would be very grateful if the Honourable Datuk Bandar will give us an opportunity to continue for the next five years (5) based on a negotiated new rental and a new profit share ratio.

C

[16] According to PW1, the only witness called by the plaintiff, Encik Mohd Muzammer bin Jamaluddin, who is the administrative officer in the Privatisation and Joint Ventures Department of the plaintiff, the plaintiff replied *vide* its letter of 4 July, 2002 stating that it agreed at p. 91 of the CBD to extend the concession period for the defendant to operate the car park on a month-to-month basis commencing 16 July 2000 until a date to be informed by the plaintiff.

D

E

[17] The extension was subject to the same terms and conditions of the privatisation agreement dated 9 February 1995 except for the profit-sharing formula. The profit-sharing formula shall now be 70% of the gross parking fees collected per month provided that the gross fees collected exceeded RM175,000 and the same is to be paid not later than the first week of the following month. The defendant was also required to pay RM500 per month being the rental for the office space for the duration of the extension period.

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[18] The defendant is not disputing that it received the letter. Indeed its conduct is consistent with the fact that it acted on the letter in that it continued to operate the car parks concesssion from 16 April 2000 until 31 July 2002 when the concession was terminated.

H

[19] The defendant is now raising the issue as to whether the privatisation agreement could be extended. I wonder if the defendant would be raising this if the concession period had been further extended past 31 July 2002. I am confident it would not be raising this. It would be against its interest to do so. To follow the reasoning of the defendant to its conclusion, it is now claiming

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a declaration that the privatisation agreement could not and was not extended upon its expiry on 15 July 2000. The defendant is also asking for the sum of RM4,523,434.56 being the sums paid by it under a non-existent profit sharing arrangement as at 31 July 2002!

[20] The court has a real difficulty following this line of argument propounded by the defendant's learned counsel Mr H R Dipendra. If the privatisation agreement could not be extended beyond the five year concession period, then there was no agreement at all from 16 July 2000 to till 31 July 2002. If that be the case, then the defendant has no business to be operating the car park and hence no right to be collecting the car park charges from the public. Has the defendant ever asked itself how it derived the right to collect the car park charges from the public that parked their vehicles there in the demised premises owned by the plaintiff?

[21] Surely that cannot be right. The defendant through its appeal letter of 27 April 2000 at pp. 1-2 of bundle E and by a further letter of appeal dated 8 July 2002 at pp. 93-94 of bundle D, must be taken to have recognised the right of the plaintiff to extend the agreement and with that the corresponding right not to extend the agreement further.

[22] It is a hollow argument and one that must fail hopelessly, having obtained an extension on a month-to-month basis from 16 July 2000 to 31 July 2002, to now say that the plaintiff had no right to extend the agreement. A closer scrutiny revealed that the only reason for the defendant's counsel to argue such was that there is no extension clause in the privatisation agreement. However learned counsel Mr H R Dipendra must surely have heard of the legal proposition that parties to an agreement may always enter into a fresh agreement to extend that which has expired subject to same or different terms and conditions. Likewise a party to an agreement may agree not to extend the agreement further upon the expiry of an agreement by effluxion of time and no one can accuse the party not wanting to extend as being unfair. If the defendant can remember its own words imploring the plaintiff to allow it to continue for another five years, it would not be raising such an argument now. It smacks of an afterthought - a desperate attempt to avoid a payment of the balance sum of RM586,049.33 which it said in para. 25 of its counterclaim that it is holding back this sum as it was not due to the plaintiff to begin with.

[23] To assert that, it had to deal with why were the previous payments of RM4,523,434.56 which were payments made out of its own calculation of the profit sharing ratio to the plaintiff amounting to RM5,109,483.89 in para. 25 of its counterclaim. It then embarked on a most unconvincing argument that the sum, and a huge one at that, had been paid under a mistake. Surely nobody pays such a huge amount under a mistake especially in the context of managing a car park where monthly payments have to be paid to the plaintiff!

[24] The defendant in their letter of appeal dated 27 April 2000 had clearly the expectation of not just payment of rental but also a new profit share ratio in the last sentence at p. 1-2 of bundle E:

> ... With these in mind we would be grateful if the Honourable Datuk Bandar will give us an opportunity to continue for the next five years (5) based on a negotiated new rental and a new profit share ratio.

[25] The plaintiff replied with its letter of 4 July 2000 at p. 91 of bundle D which the defendant said it did not receive. I guess it is more convenient for the defendant to say that as the said letter had made it expressly clear that the terms and conditions of the privatisation agreement of 9 February 1995 shall apply except that the profit sharing shall be 70% of the gross collection of car park charges per month provided the monthly collection exceeds RM175,000 per month.

[26] If the defendant had not agreed to this imposition of the new profit-sharing ratio and is now contending that there was no agreement on a profit-sharing ratio, then why did the defendant pay at all the profit-sharing which it said amounted to the following:

16 July 2000 - 31 December 2000	RM1,108,824.17
1 January 2001 - 31 December 2001	RM2,582,645.18
1 January 2002 - 31 July 2002	RM1,418,014.54
Sub-Total	RM5,109,483.89
Less amount held back	(RM 586,049.33)
Total	RM4,523,434.56

[27] The reason given by DW1, Mr R Meyanathan a/l Retnasamy, a director of the defendant and the only witness called by the defendant, was that even though he had signed the cheques for payments, his focus was on the overall group activities and that his focus was on public relations. Surely the Plaintiff would not have allowed the defendant until 31 July 2002 to operate the car park concession had the defendant not complied with the profit-sharing ratio.

[28] What is quite revealing in the letter of appeal dated 8 July 2002 at p. 94 of bundle D is set below:

> 3. Good Paymaster
>
> It is our company policy to be the best Paymaster in the industry. All our landlords do enjoy prompt rental and profit sharing payments from us on the promised date. DBKL is no different. We had kept our end of the bargain by keeping all our payments (rentals & profit sharing) punctual. After all it is our commitment to you. We are sure DBKL's Treasury could vouch for this.

[29] It looks like the defendant would like to eat its own words. When the termination came on 31 July 2002, the defendant could only pay a sum of RM210,000 by way of 18 instalments from 27 December 2002 to 26 April 2005-far from its own boasting that it paid on the promised dates the rental and profit sharing payments, or perhaps that occurred only when its concession was not going to be renewed. The Treasury of the plaintiff can vouch for the fact that all the 18 instalments were received and the receipts issued read "Payment of part of arrears of profit sharing for April-July 2002 for the Car Parks at Pasar Borong, Kuala Lumpur." The balance outstanding after each payment was also shown in the receipts exhibited at pp. 71-88 of bundle D. If the defendant had intended the payments to be for rental it could have objected to the receipts, stating the treatment of the payments or at least to have a cover letter to accompany the payments stating that it was for arrears of rental for the three months of rental for the demised premises.

Principles

[30] The matter can be resolved by referring to the doctrine of estoppel that can be called to aid when by the defendant's action or inaction, it is barred from asserting an opposite position.

[31] The Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 speaking through his Lordship Gopal Sri Ram JCA (as he then was) observed at pp. 294-295 as follows:

> The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Templeton v. Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act, 1952.
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> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA. 203; *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case *(supra)*) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *The American Surety Co of New York v. The Calgary Milling Co Ltd* [1919] 48 DLR 295; *De Tchihatchef v. The Salerni Coupling Ltd.* [1932] 1 Ch 330; *Taylor Fashions (supra)*….
>
> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at page 122) as follows:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone

> through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.* (emphasis added.)

[32] After having asked for an extension of the concession and after having obtained it, it is not open to the defendant to now say that the plaintiff had no authority to extend the concession. After having paid the profit-sharing ratio and revenue to the plaintiff it is now estopped from asserting that there was no agreement on the profit-sharing and that the past payments for the extended period had been paid under a mistake. Having received receipts issued by the plaintiff for all 18 installments of arrears payments as being for 'Arrears of Profit Sharing for April-July 2002' and having in the second appeal letter asking for a second extension referred to its promptness always in making payments of rental and profit sharing to the plaintiff, again the defendant is estopped from asserting otherwise.

[33] Learned counsel for the defendant referred my attention to the case of *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337 at p. 348 where the Court of Appeal held:

> It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl. 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the *Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd* AIR [1965] SC 1288 it was held that:
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> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such

A that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

B **[34]** If at all the above case of *Setapak Heights (supra)* supports the factual matrix of this case. The privatisation agreement having expired on 15 July 2000, the defendant had no basis and business to remain on the demised premises to continue to collect parking charges and correspondingly make rental and profit sharing C payments to the plaintiff unless it had agreed to the terms of the extension. This court must read the defendant's letter of appeal dated 27 April 2000 at pp. 1-2 of bundle E as leading to the letter of the plaintiff to the defendant dated 4 July 2000 at pp. 91-92 of bundle D wherein the plaintiff had agreed to an D extension on a month-to-month basis subject to the variation in the terms of the profit sharing formula. If as the defendant contended, that there was no basis for the extension then correspondingly there was no basis for the defendant to remain in the demised premises to continue to collect parking charges from E the public. The proper thing to do would have been to deliver vacant possession to the plaintiff.

[35] The defendant's argument that the plaintiff had no power to extend the agreement is untenable. Why apply and appeal to the F plaintiff if it is powerless to grant an extension? The skewed reading of the defendant of the plaintiff's letter of 4 July 2000 granting extension but without referring to the defendant's letter of 27 April 2000 is regrettable. The defendant had capitalised on this and launched the argument that it is not binding on the G defendant as the defendant had not received it. Learned counsel for the defendant contended that as there is no evidence of the defendant having received and agreed to the terms stated in that letter, that letter should be disregarded and be inadmissible.

H **[36]** I rejected such a proposition from the defendant. First the letter of the plaintiff dated 4 July 2000 is included in part B of the CBD. In other words the content of the letter is subject to cross-examination but the fact that there existed such a letter is not in dispute. The weight to be attached to it would depend on I whether the contents have been successfully challenged. The said letter is certainly relevant in deciding the dispute in this case. Perhaps this is a case where the defendant's action spoke louder than the words of this letter for the defendant did make payments

of profit-sharing revenue to the plaintiff as particularised in para. 25 of the defendant's counterclaim and its only assertion there was, that it was paid under a mistake. Whether there was actually a mistake is a finding of fact which this court will now make.

[37] The defendant contended that the defendant had only agreed to a month-to-month extension if only rental was required to be paid without the need to pay profit-sharing revenue. The reason given is that whole of the revenue collected after minusing the rental would be used to maintain the car parks and its computerised system and to recoup the investment that it had put in. However when the parties executed the privatisation agreement it was agreed by cl. 4.06 thereof as follows:

> Surrender of Demised Premises
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> At the expiration or earlier determination of this Agreement the Company shall surrender and deliver up possession of the Demised Premises together with all access control equipment and/ or amenities including all gates, card readers, ticket dispenser, computers, booths and all signages to the Datuk Bandar in good repair and usable condition, (fair wear and tear excepted) **without any cost and compensation** thereof. (emphasis added)

[38] In other words, even if the plaintiff did not want to extend the concession after the expiry of the five year period, the defendant would have no cause of complaint. Indeed the defendant's letter of appeal dated 27 April 2000 at the last paragraph thereof at p. 2 of bundle E clearly made reference by way of an endearing entreat expressed as follows:

> ... With these in mind we would be grateful if the Honourable Datuk Bandar will give us an opportunity to continue for the next five years (5) based on a **negotiated new rental and a new profit share ratio**. (emphasis added)

[39] No where is it stated that any extension is to be just a case of the defendant paying rental without the profit-sharing element. It looks like not only is the defendant now being less than grateful for the opportunity given but that it is saying 'no way for us to pay the profit sharing revenue if it is a month-to-month extension'. One would have expected that most of the costs would have been recouped already at the expiry of the five year period but even if it be not, it is a business decision of the parties in a freely

negotiated contract. To have sung the praises of the plaintiff in the appeal letters, the defendant is now painting the plaintiff as a tough taskmaster, reaping where it has not sown!

[40] Even if the conduct of the defendant in paying the profit-sharing revenue safe for the arrears of four months from April to July 2002 can be said to be equivocal, the contents of the letter of extension of the plaintiff dated 4 July 2000 at pp. 91-92 bundle D do not appear to be. The said letter translated into English reads:

> Extension of the period of operation of managing the Privatisation of the Computerised Car park at Pasar Borong, Kuala Lumpur.
>
> 2. As you are aware the operation of the management of the car park undertaken by you will expire on 15 July 2000. In view of the fact that DBKL is still looking for a new operator of the car park, DBKL has agreed to appoint you to continue with the operation of the managing of the car park on a **month-to-month basis** commencing 16 July 2000 until a date to be notified by DBKL.
>
> 3. With this appointment, **all the terms and conditions contained in the privatisation agreement executed between you and Datuk Bandar Kuala Lumpur dated 9 February 1995 will continue to be enforced** except for the profit sharing clause. **DKL shall receive 70% of the gross monthly car park charges** collected in the event of the collection exceeding RM175,000.00 per month for the whole duration of the extension. DBKL shall receive the profit sharing amount every month and not later than a week from the expiry date of the monthly extension. You are also required to pay the rental of the office space of RM500.00 per month for the duration of the extension. (emphasis added)

[41] Assuming for a moment that the defendant was expecting a formal agreement to be drawn up before the terms of the extension are binding on it, then can rely on the wisdom of Mr Justice Parker in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at pp. 288-289 where it is stated:

> It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a

mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

[42] The above dicta was quoted with approval by the Federal Court in *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39 at p. 48.

[43] I find that here the execution of a further contract is not contemplated by the parties and that the parties have agreed to be bound by this letter of extension as constituting the extension terms of the agreement. There is already a contract of extension that had already come into being both by this correspondence and by the conduct of the parties.

There was much ado as to whether the document at pp. 92-93 of bundle D appearing in part C can be admitted as Exhibit. The evidence of PW 1 was that these two documents are found in his file for this case. Page 95 referred to the defendant at the top left hand side with the caption "DBKL Profit Sharing Payment Listing Period: April 2002 to July 2002." It then sets out the profit sharing for April - July 2002 and the 'Proposed Instalment Payments Schedule' covering 25 instalments all in with the first instalment for 28 November 2002 for RM40,000 and the subsequent monthly instalments until 13 November 2004 for RM31,5000 per month.

At the bottom it has the words: 'Prepared by Muthu' and finally 'Dated 9 December 2002.'

The second page at p. 96 of bundle D has the caption: 'Privatisation of management of Computerised Car park at Pasar Borong Selayang by PPKA Sdn Bhd.' Below that are the words 'Statement of Payment and Arrears for Profit Sharing' and followed by 'Collection of Profit Sharing received until April 2002 till July 2002:

The table which is the same as the one at para. 7 of the statement of claim follows thereafter and below that the statement found at para. 8 of the statement of claim.

[44] I was referred by learned counsel for the plaintiff, Cik Maszalina binti Maspol, to the observation of his Lordship, Edgar Joseph Jr FCJ in *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227 at p. as follows:

> It is clear law that not only admissions made personally by the party but also admissions by those in privity with the party are admissible as exceptions to the hearsay rule. The most examples of those in privity are predecessors in title, referees and **servants or agents acting within the scope of their authority**. (See s. 18(1) of the Evidence Act 1950). (emphasis added)

[45] I see no reason to disbelieve PW1 when he said that these two documents were found in his file, kept with respect to this defendant. The defendant argued that the plaintiff ought to call Mr Muthu, if the document is to be admitted as an exhibit. Mr Muthu the defendant admitted its staff was liaising with the plaintiff, but had already left the defendant. If that be so, the defendant can always call Mr Muthu to deny that he was the one who had prepared the document at p. 95 of bundle D. At any rate the weight to be attached would depend on whether the contents therein dovetail or sync with the facts not in dispute. I find that the amount as stated for the arrears of profit sharing for April-July 2002 of RM796,049.33 cannot be disputed as the sum can be derived from the figures pleaded by the defendant itself at para. 25 of its counterclaim. In para. 25 of the defendant's counterclaim the defendant had admitted that it is withholding back RM586,049.33. At p. 96 of bundle D the cheques for instalment payments as evidenced by the 18 cheques exhibited at pp. 57-70 of bundle D added up to RM210,000. This sum of RM210,000 plus RM586,049.33 would add up to the sum of RM796,049.33. It is said of Maths that it is an exercise in logic and to that I must agree. The sum of RM796,049.33 being the arrears of profit sharing for April-July 2002 is derived from the defendant's very own figures. I need not even have to rely on pp. 96-97 of bundle D as evidence of the amount outstanding for the profit sharing but merely on para. 25 of the defendant's own counterclaim.

[46] A closer perusal of para. 7 and 8 of the statement of claim which substantially covered the contents of p. 97 of bundle D, showed that the defendant is not denying the correctness of the figures but merely giving the reasons why it denied the sum therein is outstanding - in other words the reason for not having to pay the said sum of RM796,049.33.

[47] I am prepared not to put any weight to the proposal set out in p. 95 of bundle D containing the 18 proposed instalment payments as having prepared by Mr Muthu pointing ordinarily to an admission.

[48] The defendant cannot blow hot and cold. Whilst the defendant has the audacity of saying that the plaintiff had not proved on the balance of probabilities the sum of RM586,049.55 being the arrears of profit sharing, the defendant is asserting that its counterclaim is to be allowed based on its own figures of RM4,523,434.56 which includes the sum of RM1,418,014.54 being the profit sharing for 1 January 2002 to 31 July 2002 less the sum of RM586,049.55 which it said it is holding back on account of payment under a mistake.

[49] How could anyone have made a mistake of such a magnitude? To have overpaid RM4,523,434.56 is either a case of gross negligence or a total lack of diligence in exercising one's fiduciary duty as a director of the company. There was not a single letter from the defendant to the plaintiff on the payment under a mistake and the first time it was raised was in the defence and counterclaim filed. Perhaps the following answer of DW1 under cross-examination is more revealing as to the frame of mind of the defendant:

> Q: Did you inform the Plaintiff about the amount overpaid?
>
> A: I did ... I went to see Puan Normah ... When we were operating the car park I was confident of clinching the deal. So I was not bothered on payment.

[50] The underlying grouse and gripe is palpable. DW 1 is in effect saying that had the plaintiff extended the concession further, the profit sharing would not have been an issue. I have no hesitation in holding that the defence and counterclaim of mistake in payment is an afterthought arrived at with the aim to avoid payments of the arrears of profit sharing revenue to the plaintiff.

[51] In coming to the above findings of believing PW1 and disbelieving DW1 I had borne in mind the strictures of her Ladyship, Siti Norma Yaakob JCA (as she then was) in *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324 at p. 330:

A In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. ...

B

[52] Learned counsel for the defendant also took umbrage with the plaintiff in that the signatory of the relevant letters at pp. 90 and 92, one Datuk Normah binti Malik was not called and instead a relative junior officer in PW1 was called to prove the plaintiff's C claim. However, as this dispute revolves around concluded written agreements and correspondence, the introduction of any oral evidence to contradict written agreements and correspondence is generally inadmissible under ss. 91 and 92 of the Evidence Act 1950.

D

Pronouncement

[53] Taking into account all the above factors referred to and after having evaluated the evidence presented, I held that the E plaintiff had proved its claim on the balance of probabilities. Judgment was entered for the plaintiff for the sum of RM586,049.33 as at 26 April 2005 together with interest at 8% per annum from date of judgment to realisation.

[54] The defendant had failed to prove its counterclaim on a F balance of probabilities and I dismissed it. I also awarded overall costs of RM20,000 to the plaintiff.

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